

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/23/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

DIANA TOMA,) 1 CA-IC 10-0044
)
Petitioner,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
THE INDUSTRIAL COMMISSION OF) Rule 28, Arizona Rules of
ARIZONA,) Civil Appellate Procedure)
)
Respondent,)
)
CHARLES SCHWAB CORPORATION,)
)
)
Respondent Employer,)
)
TOKIO MARINE/SPECIALTY RISK)
SERVICES,)
)
)
Respondent Carrier.)
_____)

Special Action-Industrial Commission

ICA Claim No. 20091-560241

Carrier Claim No. YLL90704C

Administrative Law Judge Michael A. Mosesso

AWARD AFFIRMED

Diana Toma
Petitioner Employee *in Propria Persona*

Cave Creek

T H O M P S O N, Judge

¶1 This is a special action review of an Industrial Commission of Arizona (ICA) award and decision upon review finding the claim filed by petitioner employee (Toma) for worker's compensation to be noncompensable. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

¶2 In June 2009, Toma filed a Worker's Report with the Industrial Commission of Arizona, alleging that she sustained an industrial injury on May 18, 2009. The claim was ultimately denied¹ on July 15, 2009, and Toma requested a hearing. The following evidence was presented at the hearings conducted before the Administrative Law Judge (ALJ).

¶3 Toma is employed as a senior administrator for Charles Schwab Corporation (employer), and has worked there for three years. She testified that on May 18, 2009, she went to a file cabinet to insert files, opened the top drawer, and the whole

¹ Initially, the ICA noticed the wrong carrier, Crawford & Company. Crawford denied the claim, indicating it was not the carrier. The ICA then noticed the correct carrier, Specialty Risk, and nine days later, Specialty Risk denied the claim.

cabinet fell towards her.² Toma pushed it off her, and thereafter complained of tingling and burning in the back of her neck, a headache, and pain in her shoulder. The next day, she reported the injury to her employer and saw Dr. Embry for her symptoms. Toma testified that Dr. Embry prescribed anti-inflammatory medication and several sessions of physical therapy. Toma further testified that she had some of the same symptoms prior to the May 2009 incident. Specifically, in October 2008, she slipped and fell, injuring her neck, right shoulder, and mid-back.

¶14 Dr. Maric testified that he evaluated Toma twice. The first visit took place in January 2009, relating to Toma's October 2008 injury. The second time, in September 2009, Dr. Maric was asked to evaluate Toma's complaints pertaining to the May 2009 incident. He testified that Toma told him she continued to experience pain from the time of her first visit until the May 2009 incident. Toma described "widespread diffuse complaints[,] " which Dr. Maric referred to as "non-organic pain."³ In his opinion, there was no clinically significant difference between his examinations. Dr. Maric concluded that there was no objective evidence of an injury on May 18, 2009.

² Several employees who observed Toma shortly after the May 2009 incident testified that the cabinet leaned forward a couple of inches when the file drawer was pulled out, and that it was wobbly.

³ Dr. Maric described "non-organic" pain as a form of psychological distress, in which someone can feel physical symptoms as a result of a stressful condition even if no physical injury occurred. Dr. Maric testified that organic pain, on the other hand, derives from a physical source.

¶15 The ALJ considered both written reports of Dr. Embry and Dr. Maric, but adopted the opinions and conclusions of Dr. Maric as being the "most probably correct and well-founded." The ALJ further found that Toma failed to establish that she sustained an injury, as opposed to an incident. Accordingly, the ALJ determined that Toma's claim was not compensable.

¶16 Toma filed a timely request for review, and the ALJ entered a decision upon review affirming the findings and award. Toma next brought this special action. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(2) (2003), 23-951(A)(1995), and Rule 10 of the Arizona Rules of Procedure for Special Actions.

II. DISCUSSION

¶17 In reviewing findings and awards of the ICA, we consider the evidence in the light most favorable to upholding the award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002). "It is the duty of the administrative law judge to resolve all conflicts in the evidence and to draw inferences from that evidence. When more than one inference may be drawn, the administrative law judge may choose either, and we will not reject that choice unless it is wholly unreasonable." *Johnson-Manley Lumber v. Indus. Comm'n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988). We defer to the ALJ's factual findings, but review *de novo* questions of law. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003).

¶18 Toma asserts that the ALJ denied her claim "on the basis of Dr. Embry's credentials" and alleges the ALJ ignored Dr. Embry's medical diagnosis and expertise. We find no support for these contentions in the record. The ALJ specifically considered Dr. Embry's medical report, but found Dr. Maric's conclusions to be more well-founded than those of Dr. Embry.

¶19 Additionally, Toma disputes Dr. Maric's "diagnosis⁴ of non-organic pain," arguing that before he can make such a finding, he is required to refer Toma for an "in-depth analysis and testing administered by a psychologist or psychiatrist." This court's function is not to second-guess Dr. Maric's medical findings, but rather to determine if the result reached by the ALJ "is substantiated by competent evidence." *Preuss v. Indus. Comm'n*, 15 Ariz. App. 515, 516-17, 489 P.2d 1217, 1218-19 (1971). Moreover, Dr. Maric pointed out during his testimony that the purpose of his evaluation is to "address [Toma's] complaints that relate to specific work injuries." Toma's insistence on a psychological evaluation is outside the scope of Dr. Maric's expertise, as well as the scope of our review.

¶10 Toma failed to establish the elements of her claim, specifically, (1) that she sustained an injury, as opposed to an incident; and (2) that the injury was causally related to the

⁴ Toma characterizes Dr. Maric's testimony as a "diagnosis;" however, Dr. Maric clarified that he did not make a psychological diagnosis, nor is "non-organic pain" a specific diagnosis. Rather, it is a term to describe a condition that is not physically based.

industrial incident. *Yates v. Indus. Comm'n*, 116 Ariz. 125, 127, 568 P.2d 432, 434 (App. 1977). We conclude the ALJ's decision to draw inferences from Dr. Maric's testimony was supported by competent evidence. Thus, the ALJ's choice was not wholly unreasonable.

¶11 Finally, Toma appears to raise the timeliness of the notice of denial of claim issued on July 15, 2009 as an issue for our review.⁵ When Toma presented this issue to the ALJ, the ALJ explained that the carrier, Specialty Risk, has twenty-one days from the date the carrier is noticed by the ICA that a claim is filed in which to accept or deny the claim. See A.R.S. § 23-1061(M) (2011). The ALJ noted that Toma's claim was filed with the ICA on June 4, 2009, but neither the ALJ nor Toma could determine the date that the ICA noticed Specialty Risk of the claim. Nonetheless, the ALJ concluded that the notice was timely mailed to Toma. Toma has presented no evidence supporting her position that the notice of denial was untimely, nor does our review of the record indicate that the notice was untimely. Accordingly, we affirm the ALJ's determination that the notice of denial was timely mailed to Toma.

⁵ Respondents employer and carrier neglected to address this issue in their Answering Brief.

III. CONCLUSION

¶12 For the foregoing reasons, we affirm the ALJ's award and decision upon review.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DIANE M. JOHNSON, Presiding Judge

/s/

MARGARET H. DOWNIE, Judge